

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 3rd day of June, two thousand eight.

PRESENT:

HON. ROSEMARY S. POOLER,
HON. BARRINGTON D. PARKER,
HON. PETER W. HALL,
Circuit Judges.

SHENXING ZENG,
Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,¹
Respondent.

07-1578-ag
NAC

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto R. Gonzales as a respondent in this case.

1 **FOR PETITIONER:** David Z. Su, Monterey Park, CA.

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3 **FOR RESPONDENT:** James A. Hurley, Office of
4 Immigration Litigation for Stephen
5 J. Flynn, Senior Litigation Counsel,
6 Office of Immigration Litigation,
7 and Peter D. Keisler, Assistant
8 Attorney General, U.S. Department of
9 Justice, Washington, D.C.

10
11 UPON DUE CONSIDERATION of this petition for review of a
12 decision of the Board of Immigration Appeals ("BIA"), it is
13 hereby ORDERED, ADJUDGED, AND DECREED, that the petition for
14 review is DENIED.

15 Petitioner Shenxing Zeng ("Zeng"), a native and citizen
16 of the People's Republic of China, seeks review of a March
17 21, 2007 order of the BIA affirming the July 17, 1997
18 decision of Immigration Judge ("IJ") Annette Elstein denying
19 Zeng's application for asylum and withholding of
20 deportation.² *In re Shenxing Zeng*, No. A74 153 662 (B.I.A.
21 Mar. 21, 2007), *aff'g* No. A74 153 662 (Immig. Ct. N.Y. City
22 July 17, 1997). We assume the parties' familiarity with the
23 underlying facts and procedural history of the case.

24 When the BIA does not expressly "adopt" the IJ's
25 decision, "but its brief opinion closely tracks the IJ's
26 reasoning," we may consider both the IJ's and the BIA's

² The BIA initially dismissed Zeng's appeal in November 2001. Nevertheless, because the BIA's 2001 decision was mistakenly mailed to an incorrect address, the BIA *sua sponte* vacated the November 2001 order and incorporated by reference the text of the vacated order into the March 2007 order dismissing Zeng's appeal.

1 opinions "for the sake of completeness" if doing so does not
2 affect the Court's ultimate conclusion. *Jigme Wangchuck v.*
3 *DHS*, 448 F.3d 524, 528 (2d Cir. 2006). We review the IJ's
4 factual findings, including adverse credibility
5 determinations, under the substantial evidence standard,
6 overturning them only if "any reasonable adjudicator would
7 be compelled to conclude to the contrary." 8 U.S.C. §
8 1252(b)(4)(B); *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 (2d
9 Cir. 2004) *overruled in part on other grounds by Shi Liang*
10 *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 305 (2d Cir.
11 2007) (en banc). Although this Court will vacate and remand
12 for new findings if the agency's reasoning or its fact-
13 finding process was sufficiently flawed, see *Cao He Lin v.*
14 *U.S. Dep't of Justice*, 428 F.3d 391, 406 (2d Cir. 2005), "we
15 may affirm an adverse credibility finding even when the IJ's
16 reasoning is deficient in certain respects, provided that
17 despite any errors . . . we can state with confidence that
18 the same decision would be made if we were to remand. *Xiao*
19 *Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 335 (2d Cir.
20 2006).

21 We conclude that the IJ's adverse credibility
22 determination was supported by substantial evidence. The IJ
23 properly found that while Zeng testified on cross-
24 examination that he was served with a summons to appear at a

1 police station, he omitted this information from his asylum
2 application and from his testimony on direct examination.
3 The IJ also found that while Zeng stated in his asylum
4 application that he "met frequently with the human rights
5 activists," he omitted this fact from his testimony. These
6 omissions are material and substantial when measured against
7 the record as a whole, where a key basis of Zeng's alleged
8 well-founded fear claim is that he will be arrested by the
9 police if he returns to China due to his past anti-
10 government activities. *See, e.g., Secaida-Rosales v. INS*,
11 331 F.3d 297, 308-09 (2d Cir. 2003). As a result, the IJ
12 did not err by relying on these omissions to support her
13 adverse credibility determination.

14 Moreover, the IJ found implausible Zeng's claim that he
15 did not know where he was from the time he left China in
16 October 1995 until he arrived in the United States in July
17 1996. This implausibility finding was not impermissible,
18 because the IJ evaluated Zeng's testimony using her "common
19 sense and ordinary experience" that it is implausible that
20 one could "not have any idea" where they were during a nine
21 month time period. *Siewe v. Gonzales*, 480 F.3d 160, 169 (2d
22 Cir. 2007). Hence, the IJ did not err by relying on this
23 implausibility to support her adverse credibility
24 determination.

1 The IJ further supported her adverse credibility
2 determination by referencing two minor inconsistencies in
3 Zeng's testimony. First, the IJ found that Zeng testified
4 inconsistently regarding where he hid following the attempt
5 by the police to arrest him. Second, the IJ found Zeng
6 testified inconsistently regarding the name of the flour
7 factory where he worked. The IJ refused to credit Zeng's
8 explanations for these inconsistencies, and there is nothing
9 in the record that would compel a reasonable fact-finder to
10 do so. See *Majidi v. Gonzales*, 430 F.3d 77, 80-81 (2d Cir.
11 2005). As a result, the IJ did not err by relying on these
12 inconsistencies to support her adverse credibility
13 determination. See *Tu Lin v. Gonzales*, 446 F.3d 395, 402
14 (2d Cir. 2006) ("Even where an IJ relies on discrepancies or
15 lacunae that, if taken separately, concern matters
16 collateral or ancillary to the claim, the cumulative effect
17 may nevertheless be deemed consequential by the
18 fact-finder.") (internal quotation marks and citation
19 omitted). Having called Zeng's testimony into question, the
20 agency also properly found that his failure to provide
21 corroborative evidence, such as letters from his family or
22 copies of the pamphlets that he passed out to co-workers in
23 China, rendered him unable to rehabilitate his testimony.
24 See *Xiao Ji Chen*, 471 F.3d at 341.

1 While the IJ's decision is not without error, remand
2 would be futile in this case, as we can confidently predict
3 that the agency would reach the same conclusion on remand.
4 *See Xiao Ji Chen*, 471 F.3d at 339. When considered as a
5 whole, the agency's error-free findings provided substantial
6 evidence in support of the adverse credibility
7 determination.

8 Because the only evidence of a threat to Zeng's life or
9 freedom depended upon his credibility, the adverse
10 credibility determination in this case necessarily precludes
11 success on his claim for withholding of deportation. See
12 *Paul v. Gonzales*, 444 F.3d 148, 156 (2d Cir. 2006).

13 For the foregoing reasons, the petition for review is
14 DENIED. As we have completed our review, any stay of
15 removal that the Court previously granted in this petition
16 is VACATED, and any pending motion for a stay of removal in
17 this petition is DISMISSED as moot.

18
19 FOR THE COURT:
20 Catherine O'Hagan Wolfe, Clerk

21
22 By: _____